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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JIM MANUEL, Defendant and Appellant.	A149375 (Solano County Super. Ct. No. FCR296161)

This is an appeal from judgment after a jury convicted defendant Jim Manuel of 24 counts of committing a lewd act on a 15-year-old child when defendant was at least 10 years older than the child (Pen. Code, § 288, subd. (c)(1)).[1] According to defendant, the trial court committed reversible error because its instruction to the jury on consideration of other, uncharged sexual acts against a minor lessened the prosecution's burden of proof, and because its exclusion of key evidence relevant to the victim's credibility deprived him of the opportunity to mount a full defense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 24, 2013, an information was filed charging defendant with 29 counts of lewd and lascivious acts upon the victim, Monica, a child between the ages of 14 and 15, when defendant was at least 10 years older than her, in violation of section 288, subdivision (c)(1). On July 11, 2014, the trial court dismissed counts 1 through 5, which were based on criminal acts alleged to have been committed when Monica was 14 years

[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

old, on the defense's motion. The remaining counts, alleging offenses committed when Monica was 15 years old (on or between July 16, 2001, and July 15, 2002) were then renumbered 1 through 24. The subsequent jury trial revealed the following facts.

I. The Prosecution's Case.

A. The Charged Offenses.

Defendant, born in 1959, worked as a piano teacher and choir director of a church in Fairfield. Monica, born in 1986, met defendant in 2000, her ninth grade year. Defendant was a friend of Monica's mother and belonged to the same church. Beginning when Monica was 14 years old, she took piano lessons from defendant, first once a week and, later, two or three times a week. Initially, these lessons occurred at the church; later, they occurred at defendant's home in Suisun City, with defendant picking Monica up beforehand and dropping her off at home afterward.

While Monica was still 14 years old, defendant began calling her at home. They would discuss topics such as family, school and music. Beginning in early 2001, about six months before her 15th birthday, defendant began engaging Monica in phone sex at least once a week, asking Monica to touch herself in the genital area and telling her he was doing the same to himself. Monica denied actually touching herself, and testified that when defendant encouraged her to tell stories about her sexual experiences, she would make them up. These conversations, which lasted between 30 minutes and an hour and occurred between 9:00 p.m. and midnight, were on the landline telephone near the kitchen in Monica's family home while her family was "mostly asleep . . . ." On occasion, another family member would answer the phone when defendant called Monica.

In the summer of 2001, defendant first kissed Monica on the mouth. This occurred on Monica's doorstep when she was 14 or 15 when defendant dropped her off after "some sort of summer activity" at school. Defendant thereafter kissed her at least once weekly in a sexual manner, using his tongue.

About two weeks after first kissing Monica, defendant asked her over the telephone to give him her panties and, when she agreed, stopped by her house to retrieve

them. About three or four weeks later, defendant began touching her, first on her upper body, including her breasts. He subsequently began touching her lower body under her clothes, including her genital area. She also began touching him (including his genitals) at his direction. This touching occurred at least once weekly when Monica was 15.

Several months after defendant began touching Monica, he began performing oral sex on her and, eventually, had Monica perform oral sex on him. Monica could not recall whether this oral sex began in 2001 or 2002. Often, this touching and oral sex occurred while they were parked in his car, and, once, he touched her vagina while they were watching a movie at a theater.

A few months later, defendant initiated sexual intercourse with Monica and told her he loved her. Defendant and Monica thereafter maintained a sexual relationship until 2005, when she was 19. Monica ended their relationship upon learning defendant had been married for three years.

In 2006 or 2007, Monica confided in her friend and fellow churchgoer Ashley that she had been in a sexual relationship with defendant that began when she was a child. According to Monica, her therapist recommended sharing her story with a friend in order to try to heal from the pain this relationship had caused. Around this time, Monica learned from another church friend, Elizabeth, born in 1989, that she had had "deeply concern[ing]" phone calls with defendant when she was a child.

In August 2012, Monica reported being sexually abused as a child by defendant to the police. Monica told police that her concern that other young girls were being abused by defendant prompted her report. In particular, Monica had received several text messages from defendant earlier that year that made her suspicious, including one that wished "Eva" a happy birthday and stated that he "wish[ed] [he] had known earlier so [he] could have planned something special for [her]" and that "every day with [her] is always special for [him]." Additionally, Monica had recently learned another young girl from their church, Joy, was taking private lessons with defendant. When asked at trial why she had waited so long to report defendant, Monica responded that she did not know

his conduct was criminal and that she had justified it to herself as being a real, loving relationship.

Fairfield Police Detective Steve Trojanowski, who interviewed Monica shortly after she reported defendant, participated with Monica in a pretext phone call to defendant, a recording of which was played for the jury. During this call, Monica repeatedly referred to him having sex with her when she was 15. Defendant did not deny her allegations. In particular, Monica asked him whether "[he] . . . really loved [her]" when she was 14 and 15 years old, to which defendant responded that he "still" did and told her he "really felt something" the first time he saw her in church. When Monica asked whether "the touching" meant anything to him, defendant responded, "It meant so much." And when Monica asked if he married because the sex he had with her was "not good enough," defendant responded, "No, no. My God, no. . . . [¶] . . . [¶] . . . It was not all about just sex. It was more love, real love. That's why up to now, I still carry it with me." Defendant explained he had married someone else because "[there was] something inside [him] that was telling [him] that [what he] felt was wrong" and that he "had to push [Monica] away" so she could "move on with [her] life." Monica then asked him: "Was it making love or just having sex with me at 15?" Defendant responded, "[I]t's making love. That's what it is. I'm sorry but it is the truth." Eventually, defendant stopped answering Monica's inquiries, sounding distracted and insisting they speak in person.

B. The Uncharged Offenses.

Pursuant to Evidence Code section 1108, the prosecution offered evidence of defendant's uncharged sex acts against Monica when she was 16 years old, in violation of section 261.5, subdivision (c), unlawful sexual intercourse, and former section 288a, subdivision (b), oral copulation (renumbered as section 287 by Stats. 2018, ch. 423, § 49, No. 4 Deering's Adv. Legis. Service, pp. 284–286, eff. Jan. 1, 2019).[2] In addition, the

[2] Under Evidence Code section 1108, in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Evidence Code section 1101 so long as

jury heard from Elizabeth, Monica's church friend, who testified that defendant began calling her when she was about 12 years old and telling her he was lonely and needed someone to talk to. Defendant would also ask Elizabeth over the phone to masturbate and would breathe heavily on the phone. Elizabeth stopped talking to defendant on the phone in 2012.

II. The Defense Case.

Detective Trojanowski testified that he never received a report from Monica's therapist regarding any sexual abuse by defendant despite the mandatory legal duty of all therapists to report any sexual abuse of a minor. Nor did Monica tell him that she had spoken to her therapist about defendant's alleged abuse.

Monica's mother, Elisa, testified that Monica never mentioned being romantically involved with defendant, who was a friend of hers, and that Monica would not have been on the phone or out late at night without having her permission. Elisa acknowledged, however, not always knowing about Monica's afternoon activities, and recalled defendant once asking her for permission to take Monica to the movies.

Several character witnesses testified on defendant's behalf, including friends from his church and his former housemate during the time of the alleged abuse. These individuals testified to defendant's honesty and professionalism when working with children. Joy, the young churchgoer who Monica had expressed concern about, testified that she took piano lessons from defendant when she was 15 years old and that he never behaved inappropriately toward her. Another of defendant's young students, Dana, also testified that she received lessons from defendant and was never sexually abused by him.

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the evidence is not inadmissible pursuant to Evidence Code section 352. (Evid. Code, § 1108, subd. (a).) Evidence Code section 352, in turn, gives the trial court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Lastly, defendant's former roommate testified that, contrary to Monica's testimony, defendant was not living in the Suisun City loft in 2001 and 2002 but, rather, was living with her.

III. The Verdict, Sentence & Appeal.

On July 16, 2014, defendant was found guilty as charged. On July 13, 2016, he was sentenced to 17 years 4 months in state prison. This timely appeal followed.

DISCUSSION

Defendant raises three arguments on appeal. First, he contends the trial court committed structural error when reading the jury a modified version of CALCRIM No. 1191 because, in allowing the jury to consider evidence of other, uncharged sexual acts he committed against Monica when she was 16 years old, the court lessened the prosecutor's burden of proof with respect to the charged offenses. Second, in a related argument, he contends his trial attorney rendered ineffective assistance by failing to raise a timely and specific objection to or to propose a clarification of the version of CALCRIM No. 1191 given by the trial court in this case. Lastly, he contends the trial court prejudicially erred by excluding evidence relating to a journal Monica kept during the relevant time period and, in particular, a journal entry she wrote on her 18th birthday. We address these arguments in turn.

I. Instructing the Jury on a Modified Version of CALCRIM No. 1191.

The trial court read the following version of CALCRIM No. 1191 relating to defendant's alleged uncharged sex crimes to the jury:

"The People presented evidence that the defendant committed the crimes of oral copulation with a person under 18 and unlawful sexual intercourse involving [Monica] and annoying or molesting a child under the age of 18 involving [Elizabeth] that were not charged in this case. These crimes are defined for you in these instructions. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed uncharged offenses.

"Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met their burden of proof, you must disregard this evidence entirely.

"If you decide the defendant committed the uncharged offenses you may but are not required to conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses and based on that decision also conclude that the defendant was likely to commit and did commit a lewd act on a 15 year-old child as charged here.

"If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of a lewd act on a 15 year-old child. The People must still prove each element of every charge beyond a reasonable doubt. Do not consider this evidence for any other purpose."

On appeal, defendant contends this instruction constituted structural error because, in violation of his due process rights, it permitted the jury to convict him of the charged offenses based on proof of guilt not amounting to beyond a reasonable doubt. Defendant reasons: "Since [he] was charged only with the offense of committing a lewd and lascivious act with a minor, and not unlawful sexual intercourse or oral copulation with a person under 18, and the instructions did not limit the jurors to consideration of uncharged acts committed against Monica when she was 16 or 17, the jurors could only have understood the instructions to allow them to consider as propensity evidence the uncharged offenses of unlawful sexual intercourse and oral copulation with a minor allegedly committed against Monica when she was 15 years old." The People counter that the instruction as given properly informed the jury that consideration of an uncharged sexual act involving Monica was limited to an uncharged act committed by defendant when Monica was older than 15, and that the jury could be reasonably relied upon to follow that instruction. We agree with the People.

The trial court found the evidence of defendant's uncharged sex crimes against Monica when she was 16 years old admissible under Evidence Code section 1108, subdivision (a). To lessen any undue prejudice from this evidence, the trial court gave the jury the following limiting instruction immediately after the evidence was presented: "You've just heard a little bit of evidence about something that may have happened when the witness was 16. The 29 counts that are before the Court deal with allegations that she was either 14 or 15. [¶] So testimony about things that occurred after she turned 16 are being introduced for a limited purpose. I'll instruct you on that more fully before you start your deliberations." Then, prior to the jury's deliberations, the trial court gave the more extensive set of instructions set forth above, which carefully delineated the scope of the jury's consideration of this evidence. In doing so, the court directed the jurors that, even if they "conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. *It is not sufficient by itself to prove that the defendant is guilty of a lewd act on a 15 year-old child. The People must still prove each element of every charge beyond a reasonable doubt*. Do not consider this evidence for any other purpose." (Italics added.)

Defendant expresses concern the trial court's instruction "did not limit the jurors' consideration of propensity evidence to *uncharged acts*, namely, those allegedly committed by [him] when Monica was 16 years old and older." However, defendant's argument focuses on this particular instruction without regard for the jury charge as a whole. For example, prior to giving CALCRIM No. 1191, the trial court clearly advised the jury "defendant is charged in Counts 1 through 24 with a lewd or lascivious act on a 15 year-old child who was at least ten years younger than the defendant." The court then clarified that, to prove guilt, the People must prove, inter alia, "Three, the child was 15 years old at the time of the act; [¶] And four, when the defendant acted the child was at least ten years younger than the defendant." And to further explain the temporal (and, thus, age) requirement of counts 1 through 24, the trial court instructed that "[e]ach count alleges a specific time period [from July 16, 2001, to July 15, 2002]. . . . *You must not find the defendant guilty as to any particular count unless as to each count*: [¶] No. 1,

you all agree that the People have proved that the defendant committed at lest [*sic*] one of these [alleged] acts and you all agree on which act he committed for each offense; [¶] Or No. 2, you all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and then proved that the defendant committed at least the number of offenses charged."

Finally, after instructing the jury on every element of each charged offense, and of the prosecution's duty to prove every element of each charged offense beyond a reasonable doubt, the trial court gave CALCRIM Nos. 220, 224, 225, and 350, which, among other things, advised the jury of defendant's presumption of innocence, defined the beyond a reasonable doubt standard of proof, and instructed on each juror's duty to impartially consider all evidence, whether circumstantial or direct, before reaching a verdict.

We agree with the People these instructional safeguards were sufficient to ensure the jury did not consider the evidence of defendant's uncharged sex acts against Monica when she was 16 or older for the improper purpose of convicting him of any of the offenses charged in counts 1 through 24 based on a lesser burden of proof than beyond a reasonable doubt. (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) Indeed, the court's limiting instruction to the jury immediately after they heard the evidence of defendant's sexual abuse of Monica when she was 16, by its terms, distinguished this evidence of uncharged sex acts from the evidence of the charged sex acts that were committed when Monica was 15 years old. Moreover, the subsequent instructions were sufficiently clear and, contrary to defendant's suggestion, did not undermine—but, rather, reiterated—the prosecution's burden to prove defendant guilty of each and every charged offense beyond a reasonable doubt. We decline to presume the jury, composed of men and women of reasonable intelligence, was incapable of understanding or following them. (*Ibid.*; see also *People v. Richardson* (2008) 43 Cal.4th 959, 1027–1028.)

Accordingly, we conclude that, considered in the proper context of the jury charge as a whole, there is no reasonable likelihood the jury misunderstood or misapplied the

court's instruction pursuant to CALCRIM No. 1191.[3] (*Tyler v. Cain* (2001) 533 U.S. 656, 659, fn. 1 ["the proper inquiry is not whether the instruction 'could have' been applied unconstitutionally, but whether there is a reasonable likelihood that the jury *did* so apply it"].)

II. Ineffective Assistance of Counsel.

In supplemental briefing, defendant raises a single related argument, to wit, that his trial counsel rendered ineffective assistance by failing to object to, or request clarification of, the version of CALCRIM No. 1191 given by the trial court in this case in order to ensure the jury's consideration of propensity evidence was limited to acts occurring when Monica was 16 years old. To prevail on a claim of ineffective legal assistance, a defendant must show both deficient performance and that, but for such deficiency, a reasonable probability exists that he or she would have achieved a more favorable result. (*In re Jackson* (1992) 3 Cal.4th 578, 601, overruled on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

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[3] Defendant's authority for arguing the instruction in this case constituted structural error, *People v. Nicolas* (2017) 8 Cal.App.5th 1165, is inapposite. There, as the reviewing court explained: "The trial court plainly committed error by instructing the jury regarding uncharged acts using CALCRIM No. 375; there were, in fact, no uncharged acts admitted into evidence. . . . [T]he Attorney General concedes the instructional error and concisely describes it: '[T]he evidence of appellants' text messages in the moments leading up to the collision were not the type of prior acts evidence contemplated under Evidence Code section 1101. Given that the text messages and phone calls were a continuous back-and-forth conversation leading up to [the] time of the collision, they were an indivisible part of the offense itself.' " (*Id*. at p. 1178, first bracketed insertion added.) Thus, reversal in that case was required because the erroneous instruction told the jury that the "other acts" evidence concerning defendant's phone use immediately prior to the collision could be proven under a preponderance of the evidence standard, even though the prosecution was relying on this same evidence to prove the defendant guilty as charged under the reasonable doubt standard. (*Id*. at pp. 1181–1182; accord, *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1185–1187.) Here, to the contrary, the evidence of defendant's uncharged sex acts, oral copulation and unlawful sexual intercourse with a person under age 18, fall squarely under the ambit of Evidence Code section 1101 and is distinguishable from the evidence of his charged sex acts, lewd or lascivious acts on a 15-year-old child occurring on particular dates between July 16, 2001, and July 15, 2002.

We reject defendant's ineffective assistance claim for essentially the same reasons that we reject his underlying instructional error claim. For all the reasons set forth above, considered in the proper context of the jury charge as a whole, there is no reasonable likelihood the jury misapplied the court's instruction pursuant to CALCRIM No. 1191. (*Tyler v. Cain*, *supra*, 533 U.S. at p. 659, fn. 1.) As such, there is no basis for this court to conclude that any failure by defendant's trial attorney to object to or seek clarification of the version of CALCRIM No. 1191 given to the jury caused him undue prejudice. While perhaps more could have been done by defendant's counsel on this front, the likelihood that it would have resulted in a better outcome for him in this case is minimal. The law is clear that "a criminal defendant is entitled to a fair trial, not a perfect one." (*People v. Sixto* (1993) 17 Cal.App.4th 374, 393.)

Accordingly, defendant's claim of ineffective assistance from counsel must be rejected given the lack of any reasonable probability that he would have achieved a more favorable result had his trial attorney objected to or sought clarification of the challenged instruction in the manner defendant now proposes in hindsight. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 693 [to warrant reversal for ineffective assistance, counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"]; see also *People v. Kipp* (1998) 18 Cal.4th 349, 366 ["If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient"].)

III. Exclusion of Evidence Relating to the Victim's Journal.

Lastly, defendant contends the trial court abused its discretion and violated his federal and state constitutional rights to due process and confrontation by excluding evidence relating to Monica's personal journal. Specifically, over a defense objection, the trial court relied upon Evidence Code section 352 (section 352) to exclude Monica's journal itself, as well as much of her writing therein, including certain "flowery language" she used to describe her sexual encounters. At the same time, the court admitted several summaries of or excerpts from her journal entries. According to

defendant, this ruling was prejudicial error because the excluded evidence was highly probative of Monica's lack of credibility, as it "illustrated the confidence and facility [she] had with lying about sexual experiences, as well as demonstrated that she wrote the journal on her eighteenth birthday, although she had testified that she wrote it before ever having sexual intercourse with [him]."[4]

Decisions regarding the admissibility of evidence rest within the discretion of the trial court. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224–225.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.) Further, it is the appellant's burden on appeal to prove an abuse of discretion. (*Ibid.*)

"Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.) 'While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the

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[4] Defendant acknowledges his failure to challenge the trial court's evidentiary ruling on constitutional grounds below, yet cites *People v. Partida* (2005) 37 Cal.4th 428, 436–437, for the proposition that such constitutional challenges are preserved for appeal where, as here, the claims do not invoke facts or legal standards different from those the trial court was asked to apply. We accept this argument, and thus turn directly to the merits of defendant's constitutional claims. (*Id.* at p. 436 [" '[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal' "].)

jury.' [Citation.]" (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) However, even relevant evidence may be excluded if the trial court determines that the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

Here, the trial court agreed with defense counsel that writings in Monica's journal were highly probative of the fact that "she has fabricated things with other men in the past and therefore [may be] fabricating about [defendant's] conduct." However, to "get[] away from all the flowery language that was used [by Monica] in the course of describing certain sexual conduct," the trial court ruled that "the summary of what was written can be introduced but I am not comfortable having the journal or diary itself . . . . [¶] . . . [T]here are basically four incidents. One was oral sex with her brother when she was how many years old. The other one was sexual fondling with her step-father about three times. The next one was sexual fondling and oral sex with a guy named Johnny at age 14 and finally there was a sexual fondling alleging digital penetration with John at the prom. [¶] I think the allegation[s] of those false stories have been summarized that way. If you want to get into a little more detail about what else she wrote that [is] consistent with what she said about your client [defendant], I think that's okay."[5]

We conclude the trial court did not abuse its discretion in excluding Monica's journal itself and much of the writing contained therein, while permitting the prosecution to introduce summaries of, or excerpts from, her journal relating to the four fabricated stories referenced above. (*People v. Freeman*, *supra*, 8 Cal.4th at p. 491.) While we agree as a general matter Monica's journal was probative of the issues before the jury, including the central issues of Monica's credibility and tendency to fabricate or embellish her sexual experiences, the trial court reasonably concluded that excluding the journal itself, while admitting summaries of or excerpts from certain entries in her journal, was an appropriate way to balance the probative value of this evidence against the substantial

[5] Undisputedly, these stories taken from Monica's journal were false.

risk of prejudice it posed of confusing the jury, consuming too much time, or inducing the jury to reject Monica's testimony based upon an improper inference. (*People v. Contreras* (2013) 58 Cal.4th 123, 152 [trial court's exclusion of collateral impeachment testimony "necessarily encompasses a determination that the probative value of such evidence is 'substantially outweighed' by its prejudicial, 'confusing,' or time-consuming nature"].)

Moreover, even assuming for the sake of argument that exclusion of this evidence was erroneous, we disagree with defendant that such error was so serious as to violate his constitutional rights, or otherwise render his trial fundamentally unfair. (See, e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) As the California Supreme Court explains, "as long as the excluded evidence would not have produced a ' " 'significantly different impression' " ' of the witness's credibility, the confrontation clause and related constitutional guarantees do not limit the trial court's discretion in this regard. ([*People v.*] *Dement* [(2011)] 53 Cal.4th 1, 52 [The ' "ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." ']; see [*People v.*] *Harris* [(2008)] 43 Cal.4th 1269, 1292 [' "Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance." ']; [citation].)" (*People v. Contreras, supra,* 58 Cal.4th at p. 152.) " 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' [Citation.]" (*People v. Albarran, supra,* 149 Cal.App.4th at pp. 229–230.)

Here, the jury had before it a significant amount of evidence from Monica's journal in the form of the aforementioned journal excerpts and summaries, such that defendant was not deprived of the opportunity to impeach Monica by demonstrating her tendency to embellish or make up sexual encounters with others. Indeed, defense counsel cross-examined Monica at length regarding falsifications in her journal relating to her

sexual encounters, as well as regarding her age when writing the entries in her journal.[6] And, with respect to the journal entry on Monica's 18th birthday, while defendant is correct the actual entry was not before the jury, the following excerpt was in fact read in court and acknowledged by Monica to have been written on the date specified: "I turned 18 today [July 19, 2004]. Nothing big. Nothing special[.]"

Finally, the jury heard lengthy argument from counsel regarding Monica's fabrications and their tendency to prove that she likewise made up the incidents of sexual abuse by defendant that were alleged in this case. At the same time, the jury heard uncontroverted evidence that defendant, at some point, began having sexual intercourse with Monica, with whom he began working as a private piano tutor when she was about 14 years old, undermining any claim that she completely fantasized her sexual relationship with him. On this record, we conclude defendant's case does not present "one of those rare and unusual occasions" where an evidentiary error violated federal due process and rendered his trial fundamentally unfair. (Cf. *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 232.) Further, we conclude that the jury in this case, even if given access to Monica's entire journal, including her "flowery" language describing various sexual encounters, would not have been given a " ' " 'significantly different impression' " " of her credibility. (*People v. Contreras*, *supra*, 58 Cal.4th at p. 152.) As such, there is no basis for reversing the trial court's judgment. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1292 [" ' "Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance" ' "]; see *People v. Watson* (1956) 46 Cal.2d 818, 836 [under state law, error in the admission of evidence requires reversal in criminal trials only where "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"].)

[6] Monica testified that she made up these stories "before [she] had sex for the first time" to impress defendant and to "make him think that [she] had experiences that [she] didn't[.]"

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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Siggins, P. J.

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Petrou, J.